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No. 98-2042

IN THE
Supreme Court of the United States

JAMES BENJAMIN ET AL,
Petitioners,

v.

BERNARD KERIK, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court for Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Are the constitutional restrictions on Congress' power to enact retroactive legislation inapplicable in this case solely because the legislation terminates consent decrees that include ongoing injunctive relief?

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BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF CERTIORARI -

INTEREST OF THE AMICUS[1]

Public Citizen is a non-profit organization with approximately 150,000 members. This petition raises important constitutional issues whose potential impact extends far beyond the prison litigation context that is directly at issue here. Public Citizen agrees with petitioners that Congress' attempt in section 802(b) of the Prison Reform Litigation Act, 18 U.S.C. § 3626 (the "PLRA"), to change the conditions of existing injunctive orders and consent decrees violates principles of separation of powers, due process, and equal protection. It further agrees that the recent decision of the en banc Ninth Circuit in *Taylor v. United States*, Nos. 97-16069 and 97-16071, 1999 WL 402748 (June 21, 1999), further heightens the need for review. Public Citizen submits this brief, with the parties' consent, to explain why the PLRA also violates this Court's long-standing rule that retroactive legislation is highly disfavored and why the rationales behind that rule are also closely related to petitioners' arguments.

Through its Litigation Group, Public Citizen has been counsel in many of this Court's most important separation of powers cases, including *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta v. United States*, 488 U.S. 361 (1989). Its attorneys were also co-counsel in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1991), which prompted Congress to pass the PLRA, and in the unsuccessful effort by the plaintiffs in *Rufo* to overturn the

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[1] No person other than the *amicus curiae* and its counsel authored or made a monetary contribution toward the preparation or submission of this brief.

PLRA, *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 2366 (1998). Its lawyers have in the past, and expect in the future, to represent plaintiffs (including prisoners) in lawsuits against agencies of the state and federal governments that may result in injunctive relief and/or consent decrees. If the PLRA is upheld, Congress may well extend its retroactive approach to other areas where governments find it inconvenient to abide by promises made to settle litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PLRA changes the rules under which judgments -- whether based on a consent decree or a court ruling -- may be altered to relieve state and federal prison officials from their existing obligations. There is no disagreement that Congress made it much easier for those officials to terminate existing court orders, nor that Congress did not attempt to change (not could it have changed) the substantive law under which those orders were entered -- the Eighth and Fourteenth Amendments to the Constitution. It is clear that Congress may apply the PLRA to decrees entered after its effective date; the question is, may it constitutionally impose the PLRA retroactively?

The effect of the PLRA is the same as if respondents unilaterally added an automatic termination date to existing decrees that contained no such provision. Although the PLRA theoretically allows petitioners to maintain their decrees, that can occur only if they can prove a current violation of federal law. But that possibility cannot save the statute because requiring petitioners to start over again deprives them of the benefit of the long-term bargains they struck when the decree was entered. Therefore, if the PLRA is upheld, petitioners will have sacrificed their existing rights and obtained no more than

the opportunity to bring another lawsuit.

The issue presented here is analytically identical to that in cases where this Court has carefully scrutinized attempts by Congress to alter existing rights by retroactive legislation. Although resolved on statutory grounds, *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), spells out the constitutional considerations that determine whether the retroactive aspects of a law, such as the PLRA, will be upheld, including the breadth of the change in the law and the extent to which that change was foreseeable. In some cases, such as *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), the rights of those affected by a retroactive change in the law were embodied in a litigated judgment, while in others, such as *United States v. Winstar*, 518 U.S. 839 (1996), and *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), they were based on contractual arrangements like the consent decree at issue in this case. And in others, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the rights were not embodied in any written agreement, but were part of a general understanding of the kinds of protections private parties have from governmental interference with their property. Although this Court has been willing to allow certain kinds of changes in existing expectations, it has done so only after carefully weighing the legitimate expectations of the private party and the governmental interests at stake.

The PLRA was intended to eradicate rights to continuing relief granted prisoners in existing consent decrees, regardless of what they gave up in exchange for those rights, and with no showing of the kind of strong governmental interest that might justify such an invasion of petitioners' legitimate decree-based expectations. Yet here the Second Circuit in this case, like other courts that have considered the constitutionality of the PLRA, failed to consider how the PLRA fits into this

Court's rulings involving retroactive legislation.

Because those rights are contained in a decree that has been approved by a federal judge does not, as the courts that have upheld the PLRA seem to believe, make it *easier* for Congress to alter petitioners' rights; if anything, that fact should give those rights a firmer foundation and make altering them even more difficult. Those courts have mistakenly relied on *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856), but that case merely recognizes that a change in the substantive law on which an injunction is based (which respondents admit did not occur here) is a valid reason for modifying the injunction prospectively. Surely, if an industry had obtained a decree against a federal agency that established a mutual set of rights and obligations like those in this decree, and if Congress passed a law allowing that agency to walk away from its duties as respondents will be able to do here, this Court would scrutinize such a law with great care and not permit Congress to legislate retroactively in the absence of a substantial justification. The fact that petitioners are prisoners, rather than businesses, should only heighten the need for scrutiny, given their lack of power and their inability to defend themselves in the legislative arena.

When properly examined as retroactive legislation, the PLRA must fall. The existing rights of prison officials to modify consent decrees, as set forth in *Rufo* and Rule 60(b) of the Federal Rules of Civil Procedure, provide them ample protection against changed circumstances, while assuring that both sides will retain their bargained-for benefits. Moreover, this case presents an excellent opportunity for the Court to consider its various rights-based decisions concerning retroactive legislation in a different context, and to produce a unified theory that brings together seemingly disparate authorities.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts in PLRA Cases Have Failed to Follow This Court's Teachings Regarding Retroactive Legislation.

The fundamental error made by the Second Circuit in applying the PLRA to existing consent decrees is in failing to recognize that the PLRA is retroactive legislation. *See generally*, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv L. Rev. 1056 (1997) To be sure, this petition arises out of a motion to terminate a consent decree, but the basis for the motion is a law that purports to change the terms of all existing consent decrees in prison cases, making it much easier for prison officials to terminate the obligations to which they have previously agreed. Thus, the PLRA is "retroactive legislation" as this Court has used that term since it seeks to apply new rules to rights created in the past, in a manner that seriously disadvantages petitioners.

This Court's most recent and complete discussion of the objections to retroactive legislation is in *Landgraf v. USI Films Products*, 511 U.S. 244 (1994), where the Court construed the statute not to apply retroactively. The opinion of Justice Stevens for the Court is relevant to this petition in a number of respects. First, it defines retroactive legislation as that which "attaches new legal consequences to events completed before its enactment." *Id.* at 270. That description fits this situation like a glove, since the PLRA's new right for defendants to terminate has been added to a consent decree entered more than 20 years ago.

Second, the Court recognizes that there are constitutional objections to retroactive civil legislation, although

it describes the requirements of meeting them as "modest." *Id.* at 272. Third, it recognizes that the concerns about retroactive legislation are reflected in a number of specific constitutional provisions, such as the Ex Post Facto Clause, the Takings Clause, the Due Process Clauses, the Contract Clause, and the prohibition against Bills of Attainder. *Id.* at 266. Whether or not any of those prohibitions applies to this case -- and we believe that the petition correctly argues that at least the Due Process Clause does -- the policies behind them all support the Court's deep concerns over retroactive laws like the PLRA.

Fourth, a number of the specific objections voiced in *Landgraf* mirror this situation. Thus, the same "elementary considerations of fairness [that] dictate that individuals should have the opportunity to know what the law is and conform their conduct accordingly," that were found wanting in *Landgraf* because "settled expectations [were being] disrupted" (*id.* at 265), are being trampled on here. The PLRA has disrupted existing consent decrees and destroyed petitioners' reasonable reliance on the inability of respondents to walk away from their obligations, causing petitioners to lose "confidence about the legal consequences of their actions." *Id.* at 266. Similarly, the PLRA affects "contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. At bottom, concerns about retroactive laws are about "fair notice, reasonable reliance, and settled expectations," *id.* at 270, each of which is at issue here.

Fifth, even if the PLRA could be viewed as a change in procedural rules, *Landgraf* eliminates any notion that such a label ends the inquiry: "Nor do we suggest that concerns about retroactivity have no application to procedural rules." *Id.* at 275, n 29. Justice Scalia's concurring opinion underscores that point by his example that a change in a rule of evidence, which

would be procedural, would not be applied to testimony already given. *Id.* at 291-92.

Finally, Justice Stevens points to a particular vice of retroactive legislation that reinforces petitioners' equal protection argument: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individual consideration. Its responsivity to political pressures pose a risk that it may be tempted to use retroactive legislation as a means of retaliation against unpopular groups or individuals." *Id.* at 266.

At the end of last Term, this Court dealt with another case involving the presumption against retroactive legislation. *Martin v. Hadix*, 119 S.Ct. 1998 (1999), construed section 803(d)(3) of the PLRA, that limits the hourly rate for attorneys in prison litigation, not to apply to work performed before the effective date of the Act. Although the case presented only statutory issues, the opinions of Justice O'Connor for the majority, and Justice Ginsberg for the partial dissent, employ terminology that implicitly confirms the constitutional basis for the presumption. Thus, the majority spoke of "an impermissible retroactive effect" (*id.* at 2003), "retroactivity concerns" (*id.* at 2007), and "retroactivity problems" (*id.*), while the dissent twice described the effects of applying the law to litigation begun before the effective date as "impermissibly retroactive." *Id.* at 2011.

Most of this Court's decisions dealing with due process challenges to retroactive legislation have involved businesses that claimed that Congress added burdens to transactions that were already completed. For example, in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), Congress increased the withdrawal liability obligations of

companies that participated in common pension funds, with an effective date five months prior to enactment. In sustaining the law, this Court noted that the retroactive element must be justified by a legislative purpose beyond that needed to sustain its prospective application. *Id.* at 730. Yet respondents have attempted to meet that requirement only by claiming that existing decrees create obligations that they would prefer to eliminate. Obviously, if that rationale suffices, no retroactive law would be invalid.

The burden was satisfied in *Gray* because retroactivity was needed to remove incentives to avoid the new rules, and the period of time was limited and narrowly tailored to achieve that end. *Id.* at 731. While the Court doubted that any notice was required to satisfy due process, it found that employers such as Gray had it. *Id.* at 732. Moreover, the increased liability covered only those employees who already had vested pension rights. *Id.* at 734. By contrast, each of those factors cuts in the opposite direction in this case.

In *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), this Court found that Congress had violated the Constitution by requiring companies, which were no longer in the coal business, to pay for health benefits for families of miners who once worked for them. Justice O'Connor, speaking for a plurality of four, found that the law was an unconstitutional taking, whereas Justice Kennedy found the Takings Clause inapplicable, but he concluded that the retroactive application of the law bore "no legitimate relation to the interest which the Government asserts in support of the statute" and hence violated due process. *Id.* at 2159.

However, the differences between those opinions are less significant than their common themes. Both recognized the

law's deep concern over retroactive statutes: Justice O'Connor described them as "generally disfavored," and Justice Kennedy noted "a singular distrust" of retroactive laws. *Id.* at 2151, 2158. Their descriptions of what makes a retroactive law an unconstitutional taking or a violation of due process are also similar. As Justice O'Connor described the test, a retroactive law "might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 2149; *see also id.* at 2152-53 (focussing on the "distance into the past that the Act reaches back," the "unusual" nature of the act that "singles out certain employers to bear a burden that is substantial in amount"). Justice Kennedy's concern was with "severe retroactive legislation" that "destroys the reasonable certainty and security which are the very objects of property ownership." *Id.* at 2159. While the words are different, the approaches are quite similar.

Finally, both opinions cite cases relied on by the other and recognize that the Takings and Due Process Clauses are interrelated and tie in with other, similar constitutional limits on governmental power. *Id.* at 2149, 2151, 2153 (plurality) and 2157-58 (Kennedy, J.). Even the dissent of Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, noted both the "potential unfairness of retroactive legislation" and agreed that a due process inquiry was appropriate to determine whether the law "is fundamentally unfair or unjust." *Id.* at 2163, 2164. In sum, there is "a bedrock principle with which all nine Justices seemingly concurred: the Constitution will not tolerate legislation that retroactively imposes unexpected liability on a party for a problem not of its own creation." *The Supreme Court -- Leading Cases, Eastern Enterprises v. Apfel*, 112 Harv. L. Rev. 212, 213 (1998); *id* at 218-22. Nonetheless,

neither the Second Circuit, nor any of the other courts of appeals that have reviewed the PLRA, have considered the PLRA from this perspective.[2]

Another recent decision involving contract rights, *United States v. Winstar*, 518 U.S. 839 (1996), also directly supports the position of *amicus*. None of the *Winstar* opinions spoke in terms of retroactive legislation, but that is what was at issue. Thus, Government agencies had entered into contracts to bail out insolvent thrift institutions; in turn, the companies that acquired the thrifts were allowed to use certain favorable accounting devices to satisfy the capitalization requirements under the law. After the transactions were completed, Congress amended the law to forbid those accounting devices, thereby placing the acquiring companies in immediate violation of the law's capital requirements. The Court held that the Government could not avoid the obligations to which it had agreed and on

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[2] Both the majority and the dissent in *Martin*, *supra*, described the relevant factors in assessing retroactivity in terms that closely resemble this due process analysis, although the two opinions disagreed about how those factors applied. Thus, Justice O'Connor spoke of "reasonable reliance" (*id.* at 2006), "reasonable expectations of the parties" (*id.* at 2007), and "no manifest injustice" (*id.*), and Justice Ginsburg described the law as one that "significantly alters the consequences of [prior conduct]" (*id.* at 2011) and "frustrates reasonable reliance on prior law" (*id.* at 2012). Justice Scalia's concurrence would make retroactivity turn on whether the law affected "primary conduct" (*id.* at 2008). Since petitioners' primary conduct was the decision to enter what they believed was a mutually-binding consent decree, the law would have an impermissible retroactive effect on them.

which the companies had relied in contracting with the Government.

In one sense the law at issue in *Winstar* was not retroactive since it operated only prospectively and did not cause a default for events that occurred prior to its effective date. But it was surely retroactive as the Court defined that term in *Landgraf* since it clearly "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270. Thus, the accounting practices that were permitted beforehand were outlawed, and the transactions on which they were based directly undermined, just as if Congress had passed a law terminating the prior agreements with the Government, as Justice Souter recognized. 511 U.S. at 878 n.22.

Moreover, many of the policy concerns underlying the majority and concurring opinions in *Winstar* support a holding that the PLRA is unconstitutional because of its severe retroactive impact. In particular, the *Winstar* Court was deeply troubled by the Government's claim that it could upset the entirely reasonable reliance interests of those with whom it had contracted and shift the costs occasioned by the change in law to them, just as was attempted in the other retroactivity cases. As Justice Scalia put it, if the Government can change its obligations by enacting a new law, then this is "an absolutely classic description of an illusory promise" (*id.* at 921), which is what the consent decree here will become if the PLRA is upheld.

Another case in which this Court declined to apply a law having retroactive application is *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872). Again, like *Winstar*, the Court did not describe the law as retroactive, but there is no doubt that it was. Congress had authorized the confiscation of property of those who aided the Confederacy in the Civil War, but a prior statute

had allowed the President to pardon those who had fought on the other side. This Court then ruled that a person who was pardoned was entitled to avoid confiscation, to which Congress responded by passing a law saying that a pardon could not be offered in evidence to defeat confiscation. Mr. Klein argued that Congress did not have the authority to alter the outcome of his case, and this Court agreed. Again, while the language of the decision is not that of a challenge to a retroactive law, that is surely what was at stake, at least for those like Mr. Klein who had applied for a pardon and taken an oath to support the United States before Congress acted.[3]

Similar concerns animate this Court's regulatory takings decisions, such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, new zoning rules effectively eliminated all significant uses for the property owner's beachfront land, thereby rendering his investment almost worthless. In balancing the state's interest in land use regulation against the property owner's reasonable investment-backed expectations, the Court held that major changes in the lawful uses of property would require compensation by the state, except when "background principles of nuisance and property law" made such changes reasonably foreseeable. *Id.* at 1030. Seen from this perspective, the zoning change in *Lucas* was like

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[3] In an apparent effort to camouflage the retroactive and substantive nature of the change in the law, Congress put the prohibition in terms of evidence that could be heard and also sought to bar this Court from taking jurisdiction in cases in which a pardon had been set up as a defense to confiscation. 80 U.S. at 143. Neither device fooled the Court or prevented it from striking down the law as applied to Mr. Klein (and presumably others similarly situated).

the imposition of major new financial obligations in *Eastern Enterprise* or *Winstar*, in contrast to the modest and foreseeable change in *PBGC v. Gray*. As applied to this case, the "background principles" of law are Rule 60(b) and cases like *Rufo* interpreting it, which contain express, but limited, exceptions to the rule that consent decrees can be altered only if all parties agree.

Two cases from the 1930s confirm that the Takings Clause also reaches retroactive laws when they affect private property. Thus, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 578 (1935), the Court struck down a federal statute that significantly altered the rights of holders of "pre-existing mortgages." As the Court explained, "the Act is retroactive in terms and as applied purports to take away rights of the mortgagee in specific property" that had been acquired by the bank prior to passage of the Act. *Id.* at 589, 590. The statute was not infirm because it compromised the debt of the farmer who owned the property, but because it produced "a substantial impairment of the security" given to protect the lender. *Id.* at 595. While Justice Brandeis recognized that a different mortgage contract might have afforded the farmer the protections that Congress granted him, that did not permit Congress to alter rights under contracts already executed -- in that case more than ten years before Congress acted. *Id.* at 596. Similarly, in *Lynch v. United States*, 292 U.S. 571, 579 (1934), an attempt to invalidate the Government's contractual obligations to pay on War Risk Insurance policies was rebuffed under the Fifth Amendment's Taking Clause: "Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States." In this case the Court need not decide whether these consent decrees are "private property" within the meaning of the Takings Clause, because there can be no doubt that the rights created under them

are either "property" or "liberty" within the broader protections accorded by the Due Process Clause.

Finally, the relation between retroactive legislation and the concepts of settled expectations and reasonable reliance is illustrated by *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). At issue there was the right of the Government to insist that companies wishing to sell certain pesticides disclose trade secret information. In striking the balance between the competing interests, the Court drew the line based on whether the disclosure requirement was in place when the pesticide application was submitted. *Id.* at 1007. Where it was, disclosure could be required because, as the *Lucas* court might put it, "background principles" of law would no longer protect the pesticide maker's claimed right.

Applying these principles to the PLRA would surely require its invalidation. The decree in this case was entered more than 20 years ago when petitioners had no notice of any possibility that the decree could be terminated, except for reasons provided in the decree or in the law of equity. Petitioners gave up short-term benefits for long-term security, but if the PLRA is upheld, they will be deprived of a substantial benefit of their bargain. Respondents have offered no justification for the PLRA other than the fact they would prefer to be relieved of obligations that they undertook in exchange for petitioners' agreement not to continue with their lawsuits. Balancing petitioners' reasonable reliance on the expectations arising from the consent decree, against the lack of any basis for retroactivity other than a desire by respondents not to be subject to court orders in running their prisons, the PLRA plainly constitutes "impermissible retroactive" legislation.

Despite this long line of relevant authority, none of the

lower courts have made the connection between the doctrine of impermissible retroactivity and the PLRA, let alone undertaken the kind of analysis need to sustain the PLRA's retroactive application. Because of that fundamental misunderstanding, and because this case affords the Court an excellent opportunity to bring together seemingly disparate areas of the law that deal with retroactivity, the petition should be granted.[4]

II. Of the Two Principal Cases Discussed by the Court Below, One (*Plaut*) Supports the Foregoing Retroactivity Analysis, and Nothing in the Other (*Wheeling Bridge*) Undermines It.

In *Plaut v. Spendthrift Farms*, 514 U.S. 211, 219 (1995), this Court sustained a challenge to an act of Congress that "retroactively commands the federal courts to reopen final judgments" by extending the statute of limitations after the time for appeals from those judgments had expired. The defendants had argued against retroactivity on both due process and separation of powers grounds, but the Court ruled on what it called the narrower separation of powers basis since the

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[4] All of the cases cited above involved retroactive economic legislation, and some of the Court's statements are expressly qualified by the term "economic." *Amicus* is not aware of any cases in which non-economic retroactive legislation has been challenged in court. But given this Court's general practice of providing very limited review of economic legislation, and since the PLRA infringes on petitioners' ability to obtain vindication of their constitutional right to humane treatment, the standard of review should be no less rigorous than in economic rights cases.

alternative ground would have implicated state as well as federal statutes. *Id.* at 217.

Justice Scalia's opinion focuses on the special dangers of legislative overruling of judicial decisions, including the historical basis in separation of powers for such concerns. And his conclusion that there must be a "categorical" invalidation of legislative attempts to alter judicial judgments *id.* at 240 can only be sustained under a separation of powers analysis since, under a due process/retroactivity analysis, a balancing of the interests is required. But his concerns about overturning settled (finalized) expectations extend to all retroactive legislation, not just that affecting court judgments (*id.* at 219, 227), as illustrated by the portions of his opinion that mentions other parts of the Constitution that guard against retroactive laws. *Id.* at 237-38.

The opinion is most relevant for the PLRA when it rebuts the claim that the change in the statute of limitations can be saved by analogy to Rule 60(b). *Id.* at 233-34. The opinion acknowledges that Rule 60(b) refutes the notion that final judgments can never be reopened, but the standards contained in that Rule may not be expanded by Congress imposing "a reopening requirement which did not exist when the judgment was entered" (*id.* at 234) -- once again an exact description of the impact of the PLRA in this case.[5]

One of the major flaws in the decision below is its failure

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[5] Much of the Brief in Opposition filed by the City of New York argues that the decree is unlawful or that it is no longer needed. If such claims were correct, the City would not need the PLRA to eliminate the offending provisions.

to recognize that the principles in *Plaut* extend beyond the stated Article III basis of the decision. Suppose that the case in which the statute of limitation was extended had been litigated to final judgment in a state court. *Plaut* would not literally apply, and a decision in that case would probably not produce the kind of categorical outcome mandated in *Plaut*. But surely this Court would have to examine the impact of the law under the principles of retroactivity described above and confirmed by *Plaut*.

Or suppose that the NLRB had awarded back pay to workers in a dispute with their employer, or the FCC had resolved a contest between two broadcasters over the right to a radio license, or two businesses concluded a private arbitration under the Federal Arbitration Act. Suppose further that, after each of those determinations became final, Congress passed a law that altered the outcome of those cases. The fact that none of those cases reached a court of any kind would not make the concerns underlying *Plaut* irrelevant. Rather, the victor in those three proceedings would have the same type of grievance that the defendant had in *Plaut*: a decision that each had every reason to believe was final was no longer valid because of a retroactive statute.

There is also no rationale for limiting the trigger event to Congress passing a law, even though that was the focus on this Court's separation of powers discussion. For example, suppose that the times for petitioning for rehearing in the court of appeals, or for seeking a new trial in the district court -- both of which are set by the judicial branch -- were extended after the existing times had expired. In that situation, as applied to a case in which those deadlines had passed, the retroactive effect would be the same as in *Plaut*: a final judgment would be reopened. If the determinative fact in *Plaut* were that Congress

had stepped in, then the parties in these cases, who had their victories up-ended, would lose their challenges to the retroactive application of the new timing rules. But surely the basic policy reasons behind *Plaut* would apply in the case of judicial interference as well, and the impact on the parties in both situations is identical.[6]

In our view, *Plaut* is an extreme example of the reasons why this Court has long expressed very serious concerns about retroactive legislation. There, the legislative branch not only unsettled settled expectations, but also directly overruled a determination by a coordinate branch of government whose constitutional function is to decide the legal effects of completed transactions. Thus, the statute in *Plaut* directly infringed the constitutionally-mandated independence of another branch of government, as well as injuring the parties for whom the rule of law was retroactively changed. But as the cases cited in Point I made clear, there are broader principles underlying *Plaut*, and those principles apply to invalidate the PLRA as well.

The lower courts that have upheld the PLRA have done so primarily because of their reading of *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421 (1856). In our view, *Wheeling Bridge* does not bear anywhere near the weight that those courts and respondents place upon it. Indeed, even the dissent in *Taylor v. United States, supra*, while voting to uphold the PLRA, recognizes that the impact of *Wheeling*

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[6] The fact that these changes did not necessarily mean that the original losing party would actually win the case, rather than simply get another try, is irrelevant since in *Plaut* itself the new law only removed the bar of the statute of limitations, but did not assist the plaintiffs in establishing their claims on the merits.

Bridge is less clear and not nearly so important as other courts have believed. Pet. Supp. Br. at 50a.

Wheeling Bridge began with a suit by Pennsylvania to have the bridge declared an obstruction to the river which was used to transport goods from Pennsylvania. The problem was that the height of the bridge required vessels to lower their pipes to get under it, which was very expensive and time-consuming. Pennsylvania's claim was that the bridge was contrary to congressional enactment and an obstruction to navigation, and this Court agreed. *Wheeling & Belmont Bridge v. Pennsylvania*, 54 U.S. (13 How.) 518, 565-66 (1851). Congress then passed a law permitting the bridge to remain in place, and Pennsylvania challenged that law.

This Court held that the injunction against the bridge must be lifted because "there is no longer any interference with the enjoyment of the public right [of passage] inconsistent with the law." *Id.* at 432. In other words, the law on which Pennsylvania relied to obtain its injunction was no longer in effect, and hence the State no longer had any right to prevent the use of the bridge. Surely, if the owner had complied with the injunction, torn down the bridge, and built a new one after the law was changed, no one would contend that the prior injunction still applied, or a new one could be obtained, since the underlying substantive law had been amended.

Wheeling Bridge was cited below and in other defenses of the PLRA for the proposition that an injunction is never final and can always be modified by the legislature. But that view is overly expansive. The principal import of *Wheeling Bridge*, on which there is no disagreement, is that, when the substantive law that formed the basis of an injunction is changed, the injunction should be modified. Indeed, that appears to be the limited

proposition for which Justice Scalia cited *Wheeling Bridge* in his concurring opinion in *Martin*, *supra*, 119 S.Ct. at 2009.

That proposition, however, simply mirrors existing law in Rule 60(b)(5) that allows modification when it is "no longer equitable that the judgment should have prospective application." That rule does not apply here because the substantive law of the Eighth and Fourteenth Amendments on which these consent decrees were based has not been changed, and Congress lacks the power to do so. Nor, as *Plaut* establishes, can Congress bootstrap its way out of that limitation by adding a new grounds for termination of existing consent decrees to Rule 60(b), which is the effect of the retroactive aspects of the PLRA. Instead, the Court must examine the retroactive aspects of the PLRA, including its impact on existing injunctions, under the standards set forth above and in light of the existing provisions of Rule 60(b). *Wheeling Bridge* may have some bearing on that analysis, but it is not the "get out of jail free card" (or, more accurately, the "get out of consent decree free card") that respondents and the lower courts contend that it is. The need to correct these overly broad readings of *Wheeling Bridge*, and the failure to appreciate the broader principles that underline *Plaut*, provide further reasons for granting review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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